No. 86-339 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NATIONAL GYPSUM COMPANY,
UNITED STATES GYPSUM COMPANY, and
W. R. GRACE & CO.,
Petitioners

v.

SCHOOL DISTRICT OF LANCASTER, *et al.*,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTRODUCTION

Respondent-class representatives School District of Lancaster, Manheim Township School District, Lampeter-Strasburg School District, Board of Education of the Memphis City Schools and Napa Valley Unified School District ("Lancaster representatives"), five of the six representatives for the nationwide class certified by the District Court below, file this brief in response to the petition for certiorari to the United States Court of Appeals for the Third Circuit to review that portion of its judgment in *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), *reh'g denied* (June 2, 1986), vacating the certification of a mandatory class under Fed.R.Civ.P. 23 (b)(1)(B) and upholding the denial of certification of a mandatory class under Fed.R.Civ.P. 23(b)(2). This petition

was filed by only three of some 50 defendants in this litigation. For the reasons discussed below, the Lancaster representatives respectfully submit that the Court should deny the petition for certiorari in all respects.[1]

In the District Court proceedings below, the Lancaster representatives argued in support of the certification of mandatory classes under Rule 23(b)(1)(B) and Rule 23(b)(2), in addition to a voluntary class under Rule 23(b)(3). Specifically, they argued in favor of a Rule 23(b)(2) class for equitable relief, including mandatory injunctive relief to perform asbestos abatement action and restitutionary relief as an alternative to compensatory damages, and in support of a mandatory Rule 23(b)(1)(B) "limited fund" class for all damages. The Lancaster representatives also argued in the District Court in support of a mandatory (b)(1)(B) class for punitive damages.

After the District Court certified a 23(b)(3) compensatory damages class and a (b)(1)(B) class for punitive damages, but denied a (b)(2) class, the Lancaster representatives supported the District Court's class certification order in all respects. Thus, on appeal to the Third Circuit, they supported only the 23(b)(3) class and the 23(b)(1)(B) class.

Following extensive briefing and oral argument on all class certification issues, the Third Circuit affirmed the District Court's certification of the 23(b)(3) class and its denial of the 23(b)(2) class, but vacated the 23(b)(1)(B) class certification. For the reasons discussed below, the Lancaster representatives believe that there is no legal basis for a review by the Supreme Court of the Third Circuit's decision and that practical considerations also weigh strongly against such a review.

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[1] On August 29, 1986, all six class representatives, including Barnwell School District No. 45, joined in a brief in opposition to a petition for writ of certiorari to the Third Circuit Court of Appeals to review that portion of its judgment in the same decision *affirming* a Rule 23(b)(3) voluntary class, which petition was filed by nine other defendants in this litigation. From the very incipiency of the litigation, all class representatives have been in agreement in favor of a Rule 23(b)(3) class; they only have differed with respect to the appropriateness of a mandatory class under Rule 23(b)(1)(B) or Rule 23(b)(2).

REASONS FOR NOT GRANTING THE WRIT

All of the class representatives are in agreement that the Rule 23(b)(3) class affirmed by the Third Circuit should proceed and should not be reviewed by this Court, *inter alia*, because no special or important reason for the exercise of the Court's discretion as required under S.Ct. Rule 17.1, expressing the considerations governing review on certiorari, exists at this juncture. For the same reason, all of the class representatives are now united in urging the denial of review of the Third Circuit's determinations on mandatory class issues under Rule 23(b)(1)(B) and Rule 23(b)(2).

The decision of the Third Circuit does not warrant review by the Court. The Third Circuit's decision, effectuating a denial of mandatory class treatment in the asbestos property damage area, does not conflict with any decision of another circuit or of any state court of last resort. *Cf. Jenkins v. Raymark Industries, Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985) (certifying asbestos personal injury class under Rule 23(b)(3) but denying mandatory class treatment under Rule 23(b)(1)(B)), *affirmed*, 782 F.2d 468 (5th Cir.), *reh'g denied*, 785 F.2d 1034 (1986). Nor is there any other consideration justifying review.

Finally, there are practical considerations supporting a denial of certiorari in all respects. Whatever the perceived benefits, whether theoretical or practical, of a mandatory class in *this* litigation, the class certification proceedings alone in this case have already been unduly protracted. The District Court's interlocutory class certification decision was issued on September 28, 1984.[2] The Third Circuit's decision has now resulted in the unification of all the class representatives, and their counsel, and they are proceeding with the litigation in a united and cooperative manner to resolve it. Accordingly, the Lancaster representatives submit that the Court should not allow a further delay of this already protracted litigation by granting the review requested by a few of the many defendants herein, and should instead permit it to proceed on the merits, so as to facilitate its ultimate resolution.

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[2] However, the plaintiffs' motion for class certification was filed over half a year before that date, on March 9, 1984.

CONCLUSION

For all of the above reasons, the Court should deny the request for a writ of certiorari to the Third Circuit Court of Appeals.

Respectfully submitted,

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